

## REMARKS

The Examiner rejected claims under 35 U.S.C. § 112. However, the applicant is unable to determine which claims are rejected and for what reasons. Therefore, the applicant requests the Examiner state with more specificity which claims are rejected and the reasons therefor. A copy of the Office Action is included for substantiation.

The Examiner has rejected claims 1-4, 8, 9, 57-60, 64, and 87 under 35 U.S.C. § 102(b) as being anticipated by "KEM petal 4908034 [sic]". The Applicant respectfully disagrees. For purposes of Applicant's response hereto it is noted no such reference is of record in this matter. Applicant believes this citation to be a typographical error and that the Patent Office is referring to United States Patent 5,908,634 issued on June 1, 1999 to Phillip W. Kemp for *Animal Feed Containing Molasses Bentonite and Zeolite*.

The Applicant first notes the passage cited by the Patent Office:

. . . the present invention resides in an alkaline animal feed, which may be in granular or solid form, comprising dunder alone, dunder and molasses or dunder and molasses by products, bentonite and zeolite.

Preferably, the bentonite and zeolite act as sorptive materials for the moisture in the Dunder, molasses and molasses by-products, as the materials are mixed and bound together. In the granular form, hydrated lime may be added to the ingredients as a source of calcium, to improve pellet quality, for moisture absorbency and for pH control.

(USPN 5,908,634; Col. 3, lines 3-12).

The Applicant notes Kemp's definition of Dunder:

The material left after sugar cane juice or diluted molasses has been fermented and distilled is known as stillage, Dunder, distiller's grain or slops.

(*Id.* at Col. 4, lines 50-52).

The Applicant also notes additional comments found in Kemp:

Various trace nutrients, antibiotics, amino acids and vitamins can be incorporated in the **feed composition** . . . .

(*Id.* at Col. 4; lines 5-6).

The Applicant finally notes the following additional comments from Kemp:

The dunder, dunder and molasses, or dunder and molasses by-products are then added to the mixture so that the moisture is absorbed by the bentonite, zeolite and/or hydrated lime.

*Id.* at Col. 5; lines 27-29).

Thus, Kemp's Patent (USPN 5,908,634) teaches mixing the sticky by-product of "sugar cane juice or diluted molasses" fermentation (wherein alcohol is produced) with a dry compound to make a solid animal feed with a high sugar content. Kemp also teaches adding an antibiotic supplement to this animal feed.

This is not the Applicant's invention. Anticipation requires that "the reference must teach every aspect of the claimed invention either explicitly or impliedly." *MPEP* §706.02(a) (emphasis added). The Applicant teaches a substantially dustless animal feed premix composition in solid granular form having a high resistance to powdering which includes a particulate fermentation solid having antibiotic activity. Thus, "material left after sugar cane juice or diluted molasses has been

fermented and distilled” to which “antibiotics ... can also be incorporated” taught by the Kemp reference does not disclose a composition including “granular fermentation solids comprising an antibiotic” or “an antibiotic product of a fermentation process” of the present invention. *Id.* at Col. 1, Lines 50-53; Col. 4, Lines 5-6.

Therefore, the Applicant believes claims 1-4, 8, 9, 57-60, 64, and 87 are not anticipated nor rendered obvious by the Kemp reference. Withdrawal of the rejection is respectfully requested.

The Examiner also rejected claims 1-9, 57-64, 66-74, 77-85 and 87 under 35 U.S.C. § 102(b) as being anticipated by Klothen 4,447,421. The Applicant respectfully disagrees.

As stated earlier, anticipation requires that “the reference must teach every aspect of the claimed invention either explicitly or impliedly.” *MPEP* §706.02(a). Further, the Federal Circuit has stated:

An anticipating reference must describe the patented subject matter with sufficient clarity and detail to establish that the subject matter existed and that its existence was recognized by persons of ordinary skill in the field of the invention. *ATD Corp v. Lydall, Inc.*, 159 F.3d 534, 48 USPQ 2d 1321, 1328 (Fed Cir. 1998) (citing *In re Spada*, 911 F.2d 705, 708, 15 USPQ 2d 1655, 1657 (Fed Cir. 1990)

In the Klothen reference, a process is disclosed wherein a particulated animal feed is formed by combining a drug with a compressible carrier, followed by blending the mixture, compressing the mixture, and granulating the composition. Specifically required both in the claims and specification of the Klothen reference is the compaction step of the process. In the present invention, a substantially dustless animal premix composition is provided without the necessity of the

compaction step of the Klothen reference. Thus, the Klothen reference attempts to overcome the problem of dust by compaction of the premix which is an unnecessary step in practicing the present invention.

Additionally, the disclosure of elements is not enough, as stated by the Federal Circuit:

[A]nticipation requires the present in a single prior art reference disclosure of each and every element of the claimed invention, arranged as in the claim. *Lindemann Maschinenfabrik GmbH v. American Hoist & Derrick Co.*, 730 F.2d 1452, 221 USPQ 481, 485 (Fed. Cir. 1984) (citing *Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 220 USPQ 193 (Fed. Cir. 1984))(emphasis added)

Klothen teaches a granular antibiotic feed supplement, which is granulated through compaction to arrive at a particle. In the present invention, the actual fermentation product itself is a particle. Thus, a particle having a relatively large size is provided comprising the actual fermentation product which may be formed before a potency standardizer is selected and without having to utilize a compaction step. No where in the Klothen reference is a particle taught or suggested comprising the actual fermentation product until after a compaction step.

Furthermore, the Klothen reference teaches away from the present invention. For example, as stated in the summary of the invention of Klothen reference:

[O]ther attempts relate to the preparation of wet aggregates followed by granulation and subsequent drying of the granules .... The latter process is generally too costly for this type of application and also, because of the frequent use of water, causes stability problems with many drugs.

*Id.* at Col. 2, Ln 4-6, 11-14.

In the present invention, a "wet" process may be performed to arrive at a substantially dustless granular feed premix composition without stability problems. For example, referring to claims 66 and 77, an organism producing an antibiotic is cultured in a fermentation medium to produce a fermentation broth which is then reduced to obtain fermentation solids comprising said antibiotic. Thus, the fermentation solid comprises the antibiotic, wherein in the Klothen reference, an antibiotic is merely added to animal feed and then compacted.

Further, nowhere in the Klothen reference is disclosed the step of adding an additional quantity of an antibiotic to a fermentation broth to increase the antibiotic activity of the fermentation broth, as further claimed in the present application. As the Examiner is well aware, anticipation requires that "the reference must teach every aspect of the claimed invention either explicitly or impliedly." *MPEP* §706.02(a). The Examiner has not made a showing as to where the teaching of this sort is disclosed. As the Examiner is well aware, Applicant is required to seasonably challenge statements by the Examiner that are not supported on the record, and failure to do so will be construed as an admission by Applicant that the statement is true. *MPEP* §2144.03. Therefore, in accordance with Applicant's duty to seasonably challenge such unsupported statements, the Examiner is hereby requested to cite a reference supporting his position. If the Examiner is unable to provide such a reference, and is relying on facts within his own personal knowledge, Applicant hereby requests that such facts be set forth in an affidavit from the Examiner under 37 C.F.R. §104(d)(2). Absent substantiation by the Examiner, it is respectfully requested that the rejection under 35 U.S.C. § 102(b) be withdrawn.

CONCLUSION

In light of the forgoing, reconsideration and allowance of the claims is earnestly solicited.

Respectfully submitted,

Winstrom et al.

Dated: August 29, 2000

By:

A handwritten signature in black ink, appearing to read "Sean Suiter", written over a horizontal line.

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